May 19, 2006

VIA EMAIL – ORIGINAL TO FOLLOW

Ms. Wendy Cohen
Regional Water Quality Control Board-Central Valley Region
11020 Sun Center Drive, #200
Rancho Cordova, California 95670-6114

Dear Ms. Cohen:

Re: Comments on Proposed Resolution, Order NO. R5-2006-____ for Individual Discharger Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands

The Turlock Irrigation District (TID) appreciates the opportunity to provide additional comments on the proposed Waiver. TID appreciates the Regional Board staff's effort to hear the concerns of the regulated community and incorporate suggested changes into the revised document. However, many of the concerns raised by the previous comments submitted to the Regional Board regarding the previous drafts still remain. Of particular concern is the fact that the current Waiver fails to incorporate previous statements acknowledging that responsibility for discharges of waste to waters of the state lies with those who discharge those wastes, not with those who convey those waters after they contain waste. As such, the previous comments submitted by Debra Liebersbach and Peter McGaw on behalf of the TID are incorporated by reference.

The following is a compilation of comments regarding the revised version of the proposed Waiver.

General Comments

As indicated before to both the Regional Board and staff, TID remains supportive of the agricultural waiver process and the efforts of the local Coalition to comply with the Waiver requirements. TID has provided, and will continue to provide information to the Coalition in support of its effort to understand the local watershed, and coordinate efforts as appropriate for the benefit of the local community. However, for a variety of reasons, TID has elected not to join the Coalition. Instead, the District has applied for coverage as an individual under the existing Waiver program. In doing so, TID submitted all the necessary reports, and has developed and is implementing a Monitoring and Reporting Program designed to characterize the District's applications of pesticides and other District practices that may impact water

quality.

Nonetheless, despite previous comments regarding the appropriate limitations on Water District responsibilities for discharges by others to irrigation facilities, the draft waiver continues to include language suggesting that Water Districts are responsible for discharges by others into waters of the State. For example, the definition of a water district in Attachment A states that, "Water districts may be a discharger if the water district **accepts or receives discharges from irrigated lands**, and discharges or threatens to discharge irrigation return flows, tailwater, operational spills, drainage water, subsurface drainage generated by irrigating crop land or by installing and operating drainage systems to lower the water table below irrigated lands (tile drains) and/or stormwater runoff flowing from irrigated lands to water of the State." (Emphasis added). This is an incorrect statement of the law, since Porter-Cologne regulates discharges ***of waste*** to waters of the state. (See, e.g., Water Code section 13260). It does not regulate water ***transfers***. It is also inconsistent with earlier statements by Regional Board staff, which acknowledged that responsibility for waste discharges lies with those that generate the waste, not with those that receive the waste. (See Response to Comments, dated November 10, 2005: "…s*taff agrees that the individual discharge to a conveyance system (a conveyance system that does discharge to, or is itself waters of the State) is the party responsible for its discharge…*", page 8.)

In fact, the definition of a "discharge of waste from irrigated lands" has been expanded from the previous version to include not only "surface discharges, such as irrigation return flows, tailwater, operational spills, drainage water, subsurface drainage generated by irrigating crop land or by installing and operating systems to lower the water table below irrigated lands (tile drains), stormwater runoff flowing from irrigated lands" but also "stormwater runoff conveyed in channels or canals resulting from the discharge from irrigated lands." Again, this expanded definition of "discharge of waste" is inconsistent with California law and with earlier statements from staff. Mere conveyance of waste already added by others to waters of the state is not a "discharge of waste." (Does the State "discharge waste" when the San Joaquin River passes the gauge at Vernalis?)

What the proposed Waiver fails to recognize is that those "discharges from irrigated lands" which a water district "accepts or receives" are already covered under the Waiver. The individual grower generating the waste, or the Coalition Group representing that grower, is already responsible for characterizing the discharge of waste from their lands and implementing Best Management Practices (BMPs), if necessary. A water district's application for coverage does not override the individual grower's responsibility for their waste. As stated in Section 13260(a) of the Water Code and referenced under number 6 of the Individual Waiver, "**any person discharging waste** or proposing to discharge waste within any region that could affect the quality of the waters of the State…, shall file… a report of waste discharge… unless the Central Valley Water Board waives such requirement" (emphasis added). Again, the responsibility lies with those generating and discharging the waste to the waters of the state.

The proposed Waiver will also impose duplicate monitoring and other requirements, and duplicate costs, on many growers. Coalition Groups are required to prepare a monitoring plan

that adequately characterizes the effect of discharges for irrigated lands within the Coalition Group. Similarly, individual growers that have not joined a Coalition Group must develop a monitoring plan to characterize their own discharges. Each is also required to implement BMPs to meet water quality objectives. Between these two sets of dischargers, all discharges of waste from irrigated lands are required to be adequately monitored and mitigated. In addition, however, the Waiver for Individual Dischargers would impose monitoring and other requirements on water districts that are not members of Coalition Groups, by virtue of the fact that they "accept or receive" waste discharged by others. The water district's growers would ultimately pay the cost of monitoring and the cost of implementing any additional requirements. Thus, any grower already paying for monitoring and BMPs, either individually or as part of a Coalition Group, would be paying twice to accomplish the same task. Such an approach is unreasonable and unjust, resulting in unequal requirements and costs under the program. Those that generate the waste, or the Coalition that represents those irrigated lands, should perform monitoring and other activities required for compliance with the Waiver. In this manner, growers are treated consistently throughout the region, from Coalition to Coalition, and Water District to Water District.

The following are more specific comments related to the Individual Discharger Conditional Waiver of Waste Discharges From Irrigated Lands.

1. *Item 14, page 3:* The proposed Waiver references Water Code Section 13267(b)(1) which states that "…the regional board may require any person … furnish …technical or monitoring program reports… The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." No one would disagree that water quality in an important issue and that it must be protected. However, it is unreasonable to double-regulate local growers (which must either apply for coverage under the Waiver as an individual or join a Coalition) with land within a Water District that applies for coverage as an individual, to pay twice for coverage and monitoring. The proposed process imposes an unreasonable and unequal burden upon growers that own land in areas where a Water District has chosen not to join the Coalition as opposed to growers in other regions of the Valley. In these areas, growers will be required to pay to implement their own (or their Coalition's) Monitoring and Reporting Program, which presumably provides sufficient information to characterize the impact of their own discharges. The Coalition does and should represent the lands within the Water District that may be discharging to a local waterway, whether that water way is a canal, drain, stream or river. Monitoring by the Water District should focus on the use of pesticides or other practices of the water districts themselves that could potentially impact water quality.

2. As you know, TID has expressed concern that water districts not bear responsibility for the waste discharged by others into conveyance systems owned by the districts. TID acknowledges and appreciates the clarification in the "Responses to Comments" dated November 10, 2005 that the intent of these Waivers with respect to discharges to a conveyance system containing waters of the State is to place responsibility for water quality impacts on the discharger to the waters of the State, rather than on the operator of the conveyance system itself. (10 November 2005 Responses to Comments, page 8, "*Staff*

agrees that the individual discharger to the conveyance system (a conveyance system that does discharge to, or is itself waters of the State) is the party responsible for its discharge . . ..") TID takes Board staff at its word, as stated in this response to comments, and this intent seems to be incorporated into the current proposed Waiver (e.g., "The Conditional Waiver applies to discharges of waste *from* irrigated lands *to* surface waters, which are waters of the State." – ID Waiver, page 8, para. 38, "Scope and Description of Individual Discharger Conditional Waiver," emphasis added; also, "Discharger" is defined as the owner or operator of *irrigated lands* that discharge or have the potential to discharge waste that could directly or indirectly reach surface waters of the State." Attachment A, page 2, para. 2.) Unfortunately, however, there also seems to be contradictory language included in this version. For example, the definition of a Water District suggests that a water district may be a "discharger" on the basis of merely receiving waste discharged by others. (Attachment A, Page 4, para. 16). In the absence of a clear statement of intent in the Waiver, such as that in the response to comments, there may be misinterpretation and controversy in the future. To avoid the need to refer to documents outside the Waivers for interpretive guidance, TID suggests incorporating the language from the Responses to Comments into the Waivers. To accomplish this, the language within the waiver should be adjusted in the following sections:

a. *Attachment A, page 2, item 2:* Language from the Responses to Comments should be added to the end of the definition of "Discharger," as follows:

> **The individual discharger to a conveyance system (a conveyance system that discharges to, or is itself, waters of the State) is the party responsible for its discharge, and must apply for either a waiver or apply for waste discharge requirements.**

b. *Attachment A, page 2, item 3:* The reference to a discharge of waste as including, "…stormwater runoff conveyed in channels or canals resulting from the discharge from irrigated lands" should be removed from the definition. This wording suggests the "conveyance" alone of the stormwater would constitute a discharge. In fact, and as expressed in the November 10, 2005 responses to comments, the discharge of waste occurs when the stormwater runs off the land and *enters* the waters of the state in the conveyance system. This discharge of waste is already included in the definition's language (i.e. "stormwater runoff flowing from irrigated lands.")

In addition, the definition should to be modified to merely describe a "discharge from irrigated lands," and not a discharge of "waste." The definition of "waste" under item 15, page 3 of Attachment A clearly defines a "waste" for these purposes. All discharges from irrigated lands are not necessarily "waste." Accordingly, Attachment A, page 2, item 3 should be modified to read:

> **Discharges from irrigated lands – Surface discharges, such as irrigated return flows, tailwater, operational spills, drainage water, subsurface drainage generated by irrigating crop land or by installing and operating**

drainage systems to lower the water table below irrigated lands (tile drains) and stormwater runoff flowing from irrigated lands.

c. *Attachment A, page 4, item 16:* The definition of a "Water District" should be revised to conform to the definition in California law by deleting the language that has been added at the end of this section to describe circumstances under which a Water District may also be a "discharger." That language is inappropriate in this section (it is unrelated to the definition of "Water District"), it misstates the law and, as noted above, it misstates the intent of the Waiver (e.g., mere "acceptance" of waste discharged to waters of the State by others does not render the recipient a "discharger"). The definition of Water District should be revised to read as follows:

Water District - California law defines a water district as any district or other political subdivision, other than a city or county, a primary function of which is the irrigation, reclamation, or drainage of land or the diversion, storage, management, or distribution of water primarily for domestic, municipal, agricultural, industrial, recreation, fish and wildlife enhancement, flood control, or power production purposes. (Water Code Section 20200.) Such districts include, but are not limited to, irrigation districts, county water districts, California water districts, water storage districts, reclamation districts, county waterworks districts, drainage districts, water replenishment districts, levee districts, municipal water districts, water conservation districts, community services districts, water management districts, flood control districts, flood control and floodwater conservation districts, flood control and water conservation districts, water management agencies, and water agencies.

3. *Attachment B, page 2, item 6:* "Dischargers shall implement management practices, as necessary, to improve and protect water quality and to achieve compliance with applicable water quality objectives…." This language is overly broad, and it seems based on the premise that only the discharger's actions are impacting water quality. In some cases, there may be upstream sources or background levels that do not meet the established "water quality objectives." In earlier comments, TID referenced Mustang Creek, which flows into TID's conveyance system at times. Upstream dischargers, not TID, are responsible for the water quality impacts of their activities. The language should be revised so that it is clear that an individual discharger is only required to implement BMPs as necessary to ameliorate water quality impacts from *its* activities.

Another concern stems from the indiscriminate use of the phrase "as necessary to improve and protect water quality." Not only does this phrase appear to impose responsibility for upstream discharges, it conflicts with Water Code section 13000. Water Code section 13000 allows for some degradation of water quality from reasonable use. The phrase "as necessary to improve and protect water quality" is standardless and gives dischargers no yardstick against which to measure compliance. The requirement to implement BMPs should be limited to situations where adopted water quality objectives are not being met as a result of the discharger's activities. The language should be revised as follows:

Dischargers shall implement management practices as necessary to achieve compliance with applicable water quality objectives . . ..

4. *Attachment B, page 2, item 7:* "Dischargers shall not discharge any waste not specifically regulated by the Conditional Waiver, cause new discharges of wastes from irrigated lands that impair surface water quality, or increase discharges of waste or add new wastes that impair surface water quality not previously discharged by the Discharger . . .."

   The prohibition of "new" discharges of waste could be interpreted to mean that new pesticides or fertilizers cannot be used by agriculture under this program. This is not a reasonable restriction, and would prevent the use of less toxic alternatives as they come onto the market. This language also might be interpreted to prohibit placing new or fallowed land into production, and might even prevent growing new crops on existing parcels. The agricultural landscape is constantly adjusting to ever-changing conditions. If this is what is intended, it is unattainable and unreasonable. Moreover, it is unnecessary. Any "new" discharges of waste would need to comply with the Waivers or file a report of Waste Discharge. The language should be removed.

Thank you for this opportunity to comment of behalf of the Turlock Irrigation District. Should you have any questions regarding these comments, please do not hesitate to contact me at (209) 883-8428.

Sincerely,

- original is signed -

Debra C. Liebersbach
Water Planning Department Manager

cc: Central Valley Regional Board Members
Pamela Creedon, Executive Officer, CVRWQCB
William Croyle, CVRWQCB staff
Margie Lopez-Read, CVRWQCB staff